

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	Adversary Proceeding
THURMOND ALFRED KERN)	
(Chapter 13 Case <u>96-21363</u>))	Number <u>96-2078</u>
)	
<i>Debtor</i>)	
)	
)	
)	
THURMOND ALFRED KERN)	
)	
<i>Plaintiff</i>)	
)	
)	
)	
v.)	
)	
ANDREW TOSTENSON)	
d/b/a Southeastern Seafood Company)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

The above referenced matter having come before the Court on February 13, 1997, pursuant to the adversary complaint filed by Debtor and after a hearing and evidence having been presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On March 18, 1991, Debtor, Thurmond Alfred Kern, filed a Chapter 13 bankruptcy case, listing Defendant as a creditor with a secured claim of \$42,130.34 on a seventy-two foot shrimping boat in Debtor's possession. Debtor's case was dismissed on April 24, 1996, prior to completion of payments. At that time, the balance due to the Defendant, Andrew Tostenson, under the uncompleted plan was \$3,503.59. Debtor subsequently attempted to pay this sum of money to Defendant who refused the payment and instead insisted that the balance due, including accrued interest as a result of Debtor's failure to complete the Chapter 13 case, was \$18,516.68.

During the period from September until mid November 1996, Debtor negotiated with E. Jerrell Ramsey, attorney for Defendant, as to the amount due and the time when that amount would be paid. When the negotiations stalled, Mr. Ramsey requested that the Sheriff of Glynn County, Georgia, execute a *fi fa* and seize any available property of the Debtor. Shortly thereafter, on November 22, 1996, at 2:04 p.m., Debtor filed the present Chapter 13 bankruptcy although neither Mr. Ramsey nor the Glynn County Sheriff's Department had received notice of Debtor's second bankruptcy.

On November 25, 1996, at 10:45 a.m., the Glynn County Sheriff's Department deputies levied on Debtor's shrimp boat pursuant to the *fi fa* referred to

above. Debtor, who just had returned from a morning fishing expedition, was present at the time of the levy, but told no one that he recently had filed for protection under the Bankruptcy Code. Debtor removed certain personal belongings from the boat and permitted the Sheriff's deputies to take possession in order to move the boat to another marina. The Sheriff's deputies, unaware of the bankruptcy filing, took command of the fishing vessel, left the harbor, and attempted to motor the boat to a nearby marina. Unfortunately, during the course of the transport, the Sheriff's deputies lost control of the vessel's steering and the boat soon became embedded on an oyster bank causing significant damage.¹ Debtor's counsel contends that the Sheriff's deputies' negligence caused the damage to the boat; whereas, Defendant alleges that Debtor sabotaged the vessel's steering while removing his personal effects. Without determining why the vessel lost its steering, I find that Debtor did not prove by a preponderance of the evidence that any negligence committed by the Sheriff's deputies caused the damage to the vessel.²

Further, I find that any damage to the fishing boat during seizure occurred prior to the receipt of notice of the bankruptcy. Specifically, on that same day, at

¹ The shrimp boat was piloted by a hired pilot and manned by John Scott of the Glynn County Sheriff's Office when it ran aground.

² Besides the contentions of the parties, it is also equally plausible that the boat lost its steering through normal "wear and tear" and without additional evidence I am unable to find that the Sheriff's Deputies caused the damage.

approximately 11:00 a.m., a lawyer for the Debtor called the office of the Glynn County Sheriff and spoke to Kathy Browning. At that time, the lawyer advised Ms. Browning that the Debtor had filed bankruptcy. Ms. Browning requested confirmation in writing, which was provided in the way of a faxed copy of documents relating to the bankruptcy petition at 12:32 p.m. (Exhibit P-8). Because the vessel was seized at 10:45 a.m. and was damaged shortly thereafter, I hold that all of the damage occurred prior to the receipt of notice by the Sheriff's department.

Thereafter, the vessel was not returned to Debtor's custody, despite demand by Debtor's counsel, until December 4, 1996, a period of nine days. It is undisputed that Defendant's counsel was advised telephonically by the Glynn County Sheriff's Office of the phone call and fax from Debtor's counsel, which provided notice of the bankruptcy filing, in the late afternoon of November 25, 1996. Neither Defendant, nor his counsel, received any additional notice from Debtor, the Court, or Debtor's counsel of the filing until a conference call scheduled by the Court, on or about December 3, 1996. Thanksgiving was November 28, 1996, and the Court was closed on November 29, 1996.

As a result of the conference call on the afternoon of December 3, 1996, Defendant permitted the release of the vessel from the possession of the Glynn County Sheriff's Department on December 4, 1996. Thus, Debtor suffered a loss of use of the

vessel for nine days duration from November 25, 1996, through December 4, 1996, following actual notice of the pendency of the case. Despite the release by the Defendant, Debtor did not take possession of the vessel for several weeks after this Court issued an Order releasing the vessel to him on December 3, 1996, because of the damage that had been caused on November 25, 1996. No additional damage occurred to Debtor's vessel after the grounding that occurred prior to 12:32 p.m., on November 25, 1996.

Testimony revealed that Debtor earned a crew's share of the vessel's net income in November 1996 as follows:

November 1, 1996	\$1,299.91
November 9, 1996	\$276.73
November 20, 1996	<u>\$ 850.83</u>
Total	\$2,427.47

Testimony also revealed that December 1996 was not as good a month in the shrimping industry as November 1996. Debtor's average income, according to his bankruptcy petition and schedules, is approximately \$2,200.00 per month.³ Debtor has incurred \$3,887.50 in attorney's fees for the prosecution of this action. Damages incurred due to

³ Debtor's schedule "J" as filed on November 22, 1996 lists monthly net income of \$2,215.49 and personal monthly expenses of \$1,042.67.

the loss of steerage and subsequent grounding of the vessel totaled \$4,234.79. (Exhibit P-4).

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 362(a)(3) provides,

(a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a)(3). A basic tenet of federal bankruptcy law is that 11 U.S.C. Section 362(a) imposes an automatic stay on creditors and instantly prohibits any kind of post-petition collection activity normally available under state law, including "any act to obtain possession of property of the estate." Any post-petition act of a creditor that seizes control of a debtor's property is in violation of the automatic stay and void *ab initio*. See In re Young, 193 B.R. 620, 623 n.5 (Bankr.D.C. 1996); In re Richardson, 135 B.R. 256 (Bankr.E.D.Tex. 1992). In the present case, Debtor filed bankruptcy on November 22, 1996, and Defendant, Andrew Tostensen, obtained possession of Debtor's vessel three days post-petition on November 25, 1996. Thus, Defendant's actions were void and pursuant to 11 U.S.C. Section 542(a), Defendant was required to return the vehicle

upon Debtor's demand. Because Defendant did not permit the return Debtor's vessel until December 4, 1996, it violated its duty under the Bankruptcy Code and became liable for damages.

In regard to damages arising from a violation of the automatic stay, Congress enacted Section 362(h) which allows a remedy for any willful violation. In pertinent part, 11 U.S.C. Section 362(h) provides,

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(h). In this case, there is no question that during the afternoon of November 25, 1996, Defendant received notification of its duty to return estate property which was repossessed post-petition and that it refused to comply with federal law. The repossession itself did not constitute a willful stay violation because no actual knowledge of the filing had been received. Immediately after the seizure, however, Defendant was provided with notice of the pendency of a bankruptcy case from the sheriff's department and intentionally chose to ignore his duty to turnover the vessel.

The requirement that a stay violation be "willful" does not mean that an

entity needs to possess "specific intent" when violating the automatic stay. See In re Kirk, 199 B.R. 70, 72 (Bankr.N.D.Ga. 1996). To the contrary, for purposes of Section 362(h), "willful" is satisfied when an entity acts in a deliberate manner with the knowledge that the debtor has filed a petition in bankruptcy. See Matter of Flynn, 169 B.R. 1007, 1013 (Bankr.S.D.Ga. 1994). "[W]here there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional." Homer Nat'l Bank v. Namie, 96 B.R. 652, 654 (W.D.La. 1989). While it is clear that at the time the Glynn County Sheriff levied on the shrimp boat Defendant had not received notice of the bankruptcy filing, and that by the time actual notice was received by the Glynn County Sheriff's Office, the vessel had already been seized and damaged, Defendant, through its inaction, still caused a significant delay in the return of the vessel to Debtor, between November 25, 1996, and December 4, 1996. Accordingly, I hold that Defendant received notice beginning in the afternoon of November 25, 1996, and willfully violated the automatic stay by not permitting return of the shrimp boat until December 4, 1996.

As previously set forth, section 362(h) provides that an individual debtor injured by a willful stay violation "*shall recover* actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. Section 362(h) (emphasis added). Thus, upon a finding of a willful stay violation, the statute requires that a court award actual damages and further provides for an award

of punitive damages within the discretion of the court. *See Davis v. IRS*, 136 B.R. 414, 423 n. 20 (E.D.Va. 1992); *Matter of Mullarkey*, 81 B.R. 280, 284 (Bankr.D.N.J. 1987). Notwithstanding the mandatory tone of Section 362(h), Debtor still retains the burden of proving his or her actual damages. *See Matter of Flynn*, 169 B.R. at 1021. As presented, the evidence supports an award of actual damages in the amount of \$660.00 for Debtor's lost income ($\$2200.00 \div 30 \times 9$) from November 25, 1996, until the return of the vessel on December 4, 1996. In addition, Debtor incurred and is entitled to recover \$3,887.50 in attorney's fees for the prosecution of this action. Debtor is not entitled to recover any damages that occurred during seizure by the sheriff's deputies because the seizure occurred prior to notice of bankruptcy and Debtor did not prove that the Sheriff's Department acted negligently or intentionally to damage the vessel. Further, because any delay subsequent to December 4, 1996, and until Debtor was able to return the vessel to service at the end of December, was caused by damage that occurred prior to any notice of the bankruptcy being given, Debtor is not entitled to recover for loss of use during that period.

Finally, as to punitive damages, this court has adopted the standard set forth in *In re Wagner*, 74 B.R. 898 (Bankr.E.D.Pa. 1987), for determining when "appropriate circumstances" exist for an award of such damages under section 362(h):

Punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes. Such awards are reserved for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief. To recover punitive damages, the defendant must have acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he or she was doing so.

Id. at 903 (*quoting in part* Cochetti v. Desmond, 572 F.2d 102, 106 (3rd Cir. 1978); *see also* Matter of Flynn, 169 B.R. at 1024. Considering the facts, I hold that the circumstances of this case do not warrant an award of punitive damages. Although Defendant's actions were contrary to the provisions of the Bankruptcy Code, they were not so egregious as to support an award of punitive damages. *See Id.* at 1024 (I.R.S.'s recalcitrance and indifference supported an award of punitive damages in the amount of \$10,000). Furthermore, there is no evidence that Defendant engaged on prior occasions in a similar pattern of conduct in refusing to comply with the Bankruptcy Code. Accordingly, Debtor's request for punitive damages is denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that a willful stay violation occurred from November 25, 1996, to December 4, 1996. Defendant was obligated to undo, insofar as possible,

any act taken post-petition. This he failed to do until ordered by the Court. Debtor is entitled to damages as follows:

Loss of Use of Vessel	_____	\$ 660.00
Attorney's Fees		<u>\$3,887.00</u>
TOTAL		\$4,547.00

Said amounts shall be offset from Defendant's claim in Debtor's Chapter 13 case, and Defendant's net claim allowed in the amount of \$13,969.68 unless further objection is made.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 1997.